No. 15230.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MORGAN STIVERS,

Appellant,

vs.

NATIONAL AMERICAN INSURANCE COMPANY, a Corporation, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from a judgment for the defendants after court trial rendered in the United States District Court for the Southern District of California, before the Honorable Ben Harrison, Judge, in an action to recover for a fire loss on four policies of fire insurance issued by the four defendants. Jurisdiction of the cause below was founded on diversity of citizenship and amount in controversy, pursuant to 28 United States Code, Sections 1332-1441. The pleadings show plaintiff is a citizen of the State of California, and defendants are corporations organized under the laws of states other than California, and the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars. [Tr. pp. 4, 8, 13, 17, 21, 22, 85.]

Statement of the Case.

Appellant, Morgan Stivers, was the sole owner of a packing house and other appurtenant buildings, together with machinery and equipment which was totally destroyed by fire on October 13, 1954. Each of the four appellees had issued fire policies which would cover a portion of the fire loss. However, appellees, who admit the loss and proof of loss under the policies in the amount of $38,000.00 have denied liability on the sole ground of noncompliance by the assured with the following provisions contained in each policy (California standard form) and a rider thereto relating to occupancy:

Lines 28 to 34 of policies [Pltf. Exs. 1, 2, 3 and 4]:

> "Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this company shall not be liable for a loss occurring . . . (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days . . ."

Paragraph 21 of Building, Equipment and Stock Endorsement No. 78 also attached to each policy provided:

> "Vacancy-Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except as Follows: . . . (2) If the subject of insurance (Whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant, fish reduction plant, hop kiln, rice drier, beet sugar factory, cotton gin, cotton press, or cotton seed oil mill, premission is granted (a) to remain vacant for not to exceed sixty (60) consecutive days, and (b) to remain unoccupied But Not Vacant for not to exceed ten (10) consecutive months . . ."

Appellees' entire position is based upon the contention that the packing house was "unoccupied" for a period of more than ten months prior to the fire, and that they are thereby relieved of any obligation to pay according to the terms of the policy. Simply stated, we are here dealing with a "fine print" escape from a fire loss which the insured (who paid premiums exceeding $1000.00 on the policies) had every right to expect was covered. If the insurers are correct, despite the payment of premiums and the good faith attempt of appellant to comply with policy terms as hereafter related, including the occupancy provisions, appellant was at no time covered by insurance during the almost two years the policies (which in bold print on the first pages insured against "all Loss BY FIRE") were in effect. We submit that the case is one in which the salutory rule of construction of insurance policies is particularly applicable, that since policies are drawn by the insurer, any doubts or ambiguities must be resolved in favor of the claimant. (*Bankers Life Co. v. Jacoby* (9th Cir.), 192 F. 2d 1011.)

Appellant urges that there are several separate and distinct grounds upon the basis of which the judgment below should be reversed: First, the insured premises were "occupied" at the time of the fire loss within the meaning of the policy provisions above referred to. The evidence hereinafter related at length shows that, for the purpose of satisfying the policy requirements, appellant had placed a family on the property which was residing thereon at the time of the fire. Furthermore, there was no express warranty by the insured that the plant would be in operation at any time, nor was there any express warranty respecting a watchman and the so-called "watchman endorsement" spelling out duties of a watchman was

not exacted by the insurers. Secondly, the evidence shows that appellees, through their agents, had knowledge of the fact that the plant was not packing fruit during the terms of the policies, and consented to "having someone living on the property" as compliance with the occupancy requirements.[1]

Appellant's property here involved was located near Lindsay, in Tulare County, California. [Tr. p. 105.] The insured premises consisted of an orange packing house, bunk house, loading platform and a storage building, cull bin, and all of the equipment and machinery necessary to operate a packing house. [Tr. p. 109.]

No fruit had been packed on the property since 1949. [Tr. p. 110.] A couple of months before the fire, extensive repair work had been done on the packing house in preparation for future packing, including a new roof and repairs to the windows, floors, and conveyor belt. [Tr. pp. 120-121, 196.]

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[1]We do not wish to detract from our principal points above asserted, by pointing out a lesser but obvious error on the part of the trial court. But we may point out that in each policy, various items are separately insured (packing house and loading platform, equipment, stock (field supplies, and boxes) bunk house and storage platform) with separate amounts of insurance on each item. [Pltf. Exs. 1, 2, 3, and 4.] Only the packing house and loading platform are insured "while occupied as" such, with the occupancy provisions possibly applying to "equipment" also. As to "stock" and "storage building" there is no requirement whatsoever in the policies respecting "occupancy" [Pltf. Exs. 1, 2, 3, and 4.] Since the admitted damage on these items was $7,500.00 [Tr. p. 79] the trial court should have allowed said amount to plaintiff apportioned in accordance with the terms of those policies covering the items, even if appellant were correct in asserting that the packing house was "unoccupied." And if equipment be added, the amount of this error, even accepting the trial court's reasoning, would be $18,500.00.

Truman B. Stivers, nephew of the appellant, is an insurance agent licensed by the State of California, representing a number of companies including the defendant Girard Insurance Company of Philadelphia, Pennsylvania [see "Agency Agreement", Pltf. Ex. 6], and defendant National American Insurance Company. [Pltf. Ex. 5.] Truman B. Stivers had handled practically all of his uncle's insurance business for several years. [Tr. p. 122.] As an insurance agent, he countersigned policies and endorsements, and had authority to prepare policies, but as a matter of convenience the policies were prepared by the companies' offices. [Tr. pp. 175-176.][2]

The four policies sued upon commenced on December 1, 1952, and were to expire on December 1, 1955. Three were renewal policies of policies originally issued in December, 1949, that of defendant Girard Insurance Company of Philadelphia (hereinafter referred to as "Girard"), that of defendant The Insurance Company of the State of Pennsylvania (hereinafter referred to as "Pennsylvania"), and Queen Insurance Company of America (hereinafter referred to as "Queen"). The fourth policy was a new policy, that of National American Insurance Company (hereinafter referred to as "National American").

Because of weather and economic conditions, no oranges had been picked since August of 1949 which was before the original policies went into effect, nor subse-

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[2]In passing, it should be mentioned that it has not been contended nor is there any evidence that the placing of the insurance sued upon was anything other than an arm's length business transaction, and it would seem immaterial to any of the issues here raised whether the insured gave his insurance business to a relative, rather than another agent in whom he had confidence.

quent to the issuance of the policies sued upon up to the time of the fire on October 13, 1954. [Tr. pp. 118, 110.]

In October, 1952, Truman B. Stivers called the office of appellant and told him his insurance on the packing plant was coming up for renewal. [Tr. p. 113.] The plant was not then in operation as a fruit packing plant, but was occupied by the person living on the property. [Tr. p. 113.] At that time appellant advised Truman Stivers that he wanted $40,000 coverage and also advised him that the packing house wasn't in operation. [Tr. p. 113.] The applications for insurance by appellant were oral, not written. [Tr. p. 178.]

Truman Stivers, through his office staff, then set about to place the insurance, and placed a portion of the coverage with the two companies for which he was agent, Girard and National American. The remaining policies were placed by Truman Stivers' office through another insurance agent, Roy A. McMillan, an agent for Queen and Pennsylviania, who had written the original policies with Queen and Pennsylvania. [Tr. pp. 241-242.]

Appellant had nothing to do with the selection of the companies or the apportionment of the coverage among the companies, which was handled through the insurance agents' offices.

In the first part of 1950, appellant had had a conversation with Truman Stivers about the packing house. At that time, appellant advised Truman Stivers that he didn't know whether he would ever operate the packing house anymore and Truman Stivers advised him that in order to keep the insurance in effect "you will have to keep someone on the property if it is not in operation." [Tr.

pp. 118-119.] From that time until the date of the fire appellant had someone living on the property at all times. [Tr. p. 119.]

Truman Stivers had property himself near Lindsay and was around the packing plant a number of times. [Tr. p. 115.] He testified that within a year after he wrote the first policy in 1949, he knew the plant was not operating. [Tr. p. 179.] He would make it a point to drive by the packing house to see that things were in order and found that people were living in the plant, occupying it, and if they had moved he would call it to the attention of appellant, who would see that somebody was located on the property. [Tr. p. 180.] He confirmed the conversations testified to by appellant as to occupancy, wherein Truman Stivers advised appellant "that unless he would keep somebody on the property his insurance would be in jeopardy—if it were vacant for a certain length of time he would be putting his insurance in jeopardy and he should try and keep somebody in there living on the premises." [Tr. p. 180.] The insurance agent "thought that 'occupancy' was people actually, physically living on the premises." [Tr. p. 181.]

Ruby Morris testified that she lived on the property with her husband and 16-year-old son from July 3, 1954, to the day after the fire. [Tr. pp. 221-222.] They lived in a trailer between the packing house and the bunk house about 50 feet from the packing house and 30 to 40 feet from the bunkhouse. [Tr. p. 222.] The arrangement of buildings on the property is shown on a sketch [Deft. Ex. I] and the location of the Morris trailer may be fixed therefrom. They had hot water in the bath, electricity and showers. [Tr. p. 222.] She further testified that one of the family were there all the time. They did

not perform any duties in relation to the packing house, "We just kept the people from going in, or anybody being around." With respect to whether someone ever tried to get in, "Well, they came and we would tell them we had no permission to let them go in and at one time they came and brought a note and they went in anyway, with us telling them; and my husband went in and brought them out and told them that unless Mr. Stivers came with them they were not to go in, that we had no permission to let anybody in." [Tr. pp. 222-223.] The Morrises had no key to the packing house and didn't go in at all. Arrangements for their move onto the premises had been made with appellant's foreman who "wanted us to move there and watch the packing house. And he pulled the trailer there himself." [Tr. p. 223.] Appellant's foreman fixed the hot water and showers and lights. The Morrises paid their own lights and appellant paid the rest, and the Morrises got free rent. [Tr. p. 224.] Sometimes Mr. Morris worked and sometimes both husband and wife worked, and sometimes their son worked. [Tr. p. 224.] On the morning of the fire Mr. and Mrs. Morris went to work picking olives, and she believes her son worked that day. They went to work at about 5:00 A.M. and returned about 4:00 P.M., and by that time the fire had destroyed the packing house. [Tr. pp. 225-226.]

Appellant had informed his foreman who made the arrangements to have someone living on the property that there had to be someone on the property all the time and the foreman said one of the family was there at all times [Tr. p. 125], and appellant understood that that was the case. [Tr. p. 124.]

Appellees admitted loss and damage to the insured properties under the combined coverages of the policies, as

follows: Packing house, $18,000; Equipment, $12,500; Field boxes and supplies, $5,000; and Storage Building, $2,500; or a total of $38,000. [Tr. p. 79.]

Specification of Errors.

1. Appellant urges that the insured premises were occupied at the time of the fire and that the insurance was not suspended and that the trial court erred in its findings to the contrary found in Paragraphs X, XIV, XV, XVI, XVII and XVIII of the Findings of Fact.

2. Appellant further urges that the trial court erred in finding that Truman B. Stivers, the insurance agent, was agent of appellant, rather than appellees, as found expressly or impliedly in Paragraphs II(d), IV, V, VI and VII of the Findings of Fact.

Preliminary Statement.

For clarification we may note the following propositions, for reference in this argument:

1. There is no contention that the premises here involved were "vacant"; that term is not synonymous with "unoccupied" but refers to the removal of the contents or inanimate objects from the insured premises. (See *Foley v. Sonoma County etc. Ins. Co.,* 18 Cal. 2d 232, 234.)

2. There is nothing inherently destructive of the relationship between insurer and insured in the fact of unoccupany. Paragraph 21 of endorsement No. 78 of these policies referred to above, specifically grants permission to remain vacant or unoccupied without limit of time, except that certain specific types of buildings may remain unoccupied for not to exceed ten consecutive months. Thus

as to all insured items (1 to 5) on these policies [Pltf. Exs. 1, 2, 3, and 4] the prohibition against unoccupancy for more than ten consecutive months appears to be applicable only as to Item 1, the packing house and loading platform, and possibly Item 2, equipment, and the insurance on the remaining items would remain in full force and effect irrespective of occupancy. The provision thus differs in importance from conditions increasing the hazard and losses resulting from explosion or riot (see policies, lines 28-35), a factor to be considered in construing the policies.[3]

3. As the decisions hereinafter related show, the fact that the "occupier" was absent at the time of the fire, does not mean that the property was unoccupied.

4. If the Morrises were negligent in not leaving one of the family on the property on the day the fire occurred, such engligence would not bar recovery on the part of the insured. Paragraph 23 of the Building Equipment and Stock endorsement No. 78 attached to each policy provided in part:

> "This insurance shall not be prejudiced: (1) By any act or neglect of the owner of the building(s) if the

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[3]It may also be noted that the subject of insurance described in Item 1 of each policy is a "packing house and loading platform," *not* a "fruit . . . packing plant." Strict construction would require the conclusion that since the packing plant was not in fact operating as a fruit packing plant at the time of the issuance of the policies, and it was not insured as such, the general provision of paragraph 21 of the policy endorsements governs, and "Permission is granted to remain vacant or unoccupied without limit of time . . ." [See, *e.g.*, Pltf. Ex. 1.] This may seem an extreme position, but is certainly no less extreme than the position sought to be maintained by appellees in asserting forfeiture.

> Insured is not the owner thereof, or by any act or neglect of any occupant of the building(s) (other than the named Insured), when such act or neglect of the owner of occupant is not within the control of the named Insured. . . ."

That any negligence on the part of the persons employed to live on the property would not relieve the insurers of their contractual obligation to pay this loss is made clear by section 533 of the Insurance Code of the State of California, which provides:

> "An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."

Also we point out here that the so-called "Watchman's endorsement", a standard form endorsement in the insurance industry which would require the watchman to punch a time clock, be there at all times and make certain rounds, was not exacted by the insurers. [Tr. p. 184.]

5. There was no express warranty contained in the policies either (a) that the plaint would be kept in operation at any specific times or periods, or (b) that the persons occupying the property would perform certain duties or functions.

ARGUMENT.

I.

The Insured Premises Were Not "Unoccupied" at the Time of the Fire.

Appellant challenges the findings of the trial court that the insurance was suspended by reason of the unoccupancy of the subjects of insurance for more than ten consecutive months, and that the premises were not occupied as contemplated by appellant and appellees under the insurance contracts for more than ten months prior to the fire.

Appellant has researched the questions involved both in California and elsewhere for decisions having factual parallels and finds that over the years the problems are recurring. Many deal with an express warranty by the insured (not here present) to maintain a watchman, and even in such cases the courts have generally, with few exceptions, taken a liberal attitude toward affording coverage to the insured who in good faith seeks to comply with the specific and multitudinous provisions of the policy.

A. Meaning of Unoccupancy.

The principles here applicable are discussed at length in *Silver v. London Assurance Corp.,* 61 Wash. 593, 112 Pac. 666 (1911).

In that case the policy contained a provision that the policy was void if the property became vacant or unoccupied and remained so for ten days. The court affirmed judgment for the plaintiff assured, holding that there was evidence which warranted the jury in concluding that both insured buildings were occupied at the time of the fire.

The policy insured two one-story frame buildings, each occupied as a saloon. A witness testified that he had rented one of the buildings for a saloon a week before the fire and had actually made some sales on Saturday before the Monday on which the fire occurred.

The sheriff had possession of the other building under legal process and had put a watchman in possession. The watchman had testified that he had charge of the building and was watching the building as late as the 6th or 7th of June which would be less than 10 days before the fire. The court said at page 668 of 112 Pac.:

> "The appellant, however, contends that, if the watchman was in charge of the building within ten days before the date of the fire, his possession was not such an occupancy as the contract and the law contemplates. The language of the policy, which is the same as to both buildings, is '$650.00 on the one-story frame building occupied as a saloon.' It is said that the word 'occupied' should be given its ordinary and popular meaning, and, as applied to this building, means such occupancy as ordinarily attends or is exercised over a saloon building while being used as such. The vice of this position is that the policy does not provide that the building shall be devoted to saloon purposes. The words 'occupied as a saloon' are words of description only. As was said in Burlington Insurance Company v. Brockway, 138 Ill. 644, 28 N. E. 799: 'If the company desired to make its liability contingent upon the continued occupancy of the house as a dwelling, it would have been very easy and natural to have stated that among the other conditions expressed.' In that case the policy in describing the property insured used the words, 'on the two-story shingle-roof frame building while occupied by assured as a store and dwelling house.' Some

weeks before the fire, the building was abandoned as a dwelling, but continued to be occupied as a store until it burned. The policy provided, as in this case, that it should be void 'if the premises hereby insured are or shall hereafter become vacant or unoccupied,' without notice, consent, etc. It was contended that the company undertook to insure the building only so long as it continued to be occupied both as a store and a dwelling, and in meeting this contention the court said that a provision in a policy will not be construed to be a continuing warranty unless expressed in apt words. In Doud v. Citizens' Insurance Company, 141 Pa. 47, 21 Atl. 505, 23 Am. St. Rep. 263, the tenant moved out of the house on Tuesday, the owner went to the house and stayed during Wednesday, placed a man in charge, went to her home and packed on Thursday preparatory to moving into the house on Friday, and was prevented from doing so by the burning of the house on that day. Her offer to prove that she put a man in charge of the house on Wednesday, to remain until Friday, was denied. This was held to be error. See also, Traders Insurance Company v. Race (Ill.), 29 N. E. 846; Stensgaard, etc. v. National Fire Insurance Company, 36 Minn. 181, 30 N. W. 468; Shackleton v. Sun Fire Office, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379; German Insurance Company v. Davis, 40 Neb. 700, 59 N. W. 698. In the Shackleton case a watchman or overseer was in charge of the building when the fire occurred. This was deemed a sufficient occupancy. The appellant has cited a number of cases which, it contends, show that the possession of the watchman was not an occupancy within the meaning of the policy. There is a conflict in the authorities, and any attempt to harmonize them would be futile. However, the facts in the cases cited differ so materially from the facts here that it may be said

> that they state no more than general principles. Each case must be determined largely upon its own peculiar facts. Viewing the case from the standpoint of the object to be obtained, viz., to guard against an increase of hazard, caused by nonoccupancy, it would seem to be a common sense view that the possession of a watchman, acting under a sheriff under legal process, would be such an occupancy as would satisfy the burden imposed by the policy upon the insured. The burden of proving that the buildings were unoccupied was upon the appellant."

In considering that opinion we may note that: (1) here, as there, there was no continuing warranty by the insured that the packing house would be operated at all times at the risk of suspension of the policy; (2) that many cases are cited showing that putting someone in charge of the premises suffices as occupancy even where the property is not being used or operated at the time of the fire for the purposes for which it was intended; (3) the common sense approach to the object to be attained, to guard against increase in hazard, is satisfied by having the premises occupied by a family whose residence thereon negates abandonment and who may, as did the Morrises, watch over the premises and turn away trespassers.

Two factors relied upon by the trial court herein are the facts that the Morrises did not have a key to the buildings and that none of the family was present at the time of the fire.

A decision in a situation very close factually to this action is *Home Ins. Co. v. Hancock,* 106 Tenn. 513, 62 S. W. 145.

In that case the policy of insurance insured a country dwelling house, including the household furniture, which was subsequently destroyed by fire.

It was insisted that the insurance had been forfeited on the grounds that the premises at the time of the fire were "vacant, unoccupied, and uninhabited" in violation of the conditions of the policy.

The Tennessee Supreme Court stated at 62 S. W. 145, 146:

> "The proof shows that the insured, when he applied for the insurance, told the agent that he and his family would not be in that house all the time; whereupon the agent asked him if there would be some one in the yard, and he (insured) told him there would be a man in the house, and the agent replied that would be all right. We think it obvious, from this statement, that the agent would have been satisfied to have an occupant of the tenant's room in the yard, and did not intend to demand that some one should actually reside in the house. However, the proof is that plaintiff and his family moved out of the house, and went to Wilson County, where he cultivated a farm. He left a tenant or cropper in charge of the farm in Rutherford county, but would return 'sometimes twice a week, sometimes once a week, and sometimes he would miss a week.' All of the furniture and household goods, excepting two or three articles, remained in the building. The proof is that at the time of the insurance there were two small rooms in the yard situated about 36 feet from the dwelling house. These rooms were occupied by a tenant and his family. About the 20th of December, before the fire occurred, this tenant commenced to sleep in one of the rooms of the dwelling house. On the night the fire occurred, to wit, March 24, 1900, this tenant, his wife, and a visitor were sitting in the tenant's house. The fire occurred about 25 minutes to 11 o'clock, and when first discovered

it was on top of the house at the east side. The proof shows that no one had been in the dwelling house for a week. The tenant had access to one room only, and no keys to any other part of the house. The question then presented upon these facts is whether the insured dwelling house was unoccupied in such a sense as to avoid the policy. We think not. In the first place, the agent who took the application was informed that insured expected to leave the premises. This agent inquired if there would be some one in the yard; thereby intimating that this would be sufficient. But the insured stated there would be a man in the house. To this arrangement, the agent assented, saying, 'All right.' Now, the proof shows that from December 20th the tenant had been sleeping in one of the rooms of this dwelling, and that on the night of the fire he was sitting in the tenant's room, only 30 feet away. The object of having some one on the premises is to keep out trespassers, prevent incendiarism, as well as to maintain supervision over the property. The proof is clear that no one had entered these premises, nor is there a suggestion that the fire was of incendiary origin. It could have arisen from spontaneous combustion, or possible the ignition of matches by rats or mice. But it is insisted that this tenant, having no keys or access to the other rooms, was powerless to reach the fire when discovered. No authority has been furnished where this exact point has been decided. . . . Yet, as a practical matter, we are not prepared to hold that a man who has left an occupant of a single room to watch his house must leave with him the keys to his entire premises. This is frequently impracticable and undesirable, and such a rule would result in much injustice to policy holders. In the present case all that was contemplated between

> the parties was that some one should sleep in this dwelling house and maintain a watch over the premises. There was a reasonable compliance on the part of the insured with this understanding. . . ."

In this case as in the *Home Insurance Co.* case, there is no evidence or suggestion that the fire resulted from incendiarism. Defendants were prepared to call a witness to the fire but the progress of the fire was stipulated to. [Tr. pp. 226-227.] There was here evidence that the Morrises were strict in keeping unauthorized persons off the premises and generally watched over the property. That case also points up that it may be impracticable and undesirable to leave the keys to the entire premises with the occupier; that would be so particularly where valuable equipment was in the packing house and access thereto was not essential to the Morrises' living accommodations.

On the second point emphasized by the trial court, the absence of the Morrises at the time of the fire and that they sometimes all three worked, there is a great deal of authority to the effect that the temporary absence of an occupier or watchman does not preclude recovery.

Foley v. Sonoma County, etc. Ins. Co., 18 Cal. 2d 232, dealt with the problem of temporary absence with respect to a dwelling and held that the absence of the owners on a trip for 13 days did not render the premises unoccupied, there being an intention to return, and the insurer could not escape liability under a clause authorizing unoccupancy for ten days only. The Morrises occupied the property here in question and their temporary absence at work did not render the premises unoccupied.

The same conclusion was reached in *Covey v. National Union Fire Ins. Co.,* 31 Cal. App. 579, where the tenant

had moved out, but had the intention of returning to get his remaining personal property, and was not present at the time of the fire.

In *Sierra M. S. & M. Co. v. Hartford Fire Ins. Co.,* 76 Cal. 235, there was an express warranty upon the part of the insured to employ a day and night watchman on the insured mill premises. The defendant insurer sought to avoid liability on the ground that at the time of the fire the watchman was not in the mill building, but was at a blacksmith shop about 65′ from the mill.

The California Supreme Court declared at page 237:

> "To us this seems to be nothing more than an allegation of negligence upon the part of the watchman, and for this plaintiff was not responsible under section 2629 of the Civil Code." (Now Sec. 533 of the Insurance Code, quoted above.)

See 5 Appleman, *Insurance Law and Practice,* Sec. 3008 (Temporary Absence of Watchman.)

We submit that the evidence undisputably shows that (1) the insured property was occupied at the time of the fire within the meaning of that word found in the cases. Appellant did not warrant that the packing house would be kept in operation and in good faith complied with the occupancy provision of the policies. His understanding and that of the insurance agent that placing someone on the property to live there complied with the policy terms is confirmed by the authorities as correct. The fact that the Morrises were absent at the time of the fire and may have been absent at other times, does not detract from the undisputed fact that they were physically residing on the property, and that the hazards were thereby reduced.

II.

If, in Absence of Agreement as to Occupancy Appellant Could Not Recover, the Evidence Shows Compliance With Agreement by Insured With Insurers.

We think the premises were not "unoccupied" within the meaning of the policies of insurance, in view of the well-defined meaning of that term elucidated by the authorities above cited. We believe, therefore, that it will not be necessary to determine whether there was an agreement between insured and insurers as to occupancy. Should the court feel, however, that, apart from any such agreement, the premises would have to be considered unoccupied, then it is necessary to examine into the circumstances of the agency relationship of Truman Stivers to the appellee companies and the knowledge of the situation at the plant and the communication of it to the companies.

We have already discussed the circumstances of the discussions between the insurance agent Truman Stivers and appellant which resulted in appellant placing a family to live upon the property. There can be no question of Truman Stivers' consent to this as occupancy, for the record reflects the proposal as made by Truman Stivers and numerous occasions on visits by him to the insured property to confirm that his advice was being carried out and his obvious satisfaction with appellant's performance.

We here deal with the following problems: (1) Were Truman Stivers and Ray McMillan the agents of appellees, and if so, was knowledge on their part that the plant was inoperative, if that be pertinent, knowledge to the companies; (2) assuming that it was, if the court should

hold the plant was "unoccupied" at the time the policies were issued, did such knowledge effect a waiver of any obligation of occupancy; (3) Did the express understanding or agreement between Truman Stivers and appellant as to occupancy waive appellees' rights if any to require some other type of occupancy, or estop them from urging otherwise; (4) Are the appellees Girard and National American bound by the construction placed on the occupancy provisions by their insurance agent Truman Stivers, and appellees Queen and Pennsylvania by the acceptance of such situation by their insurance agent, Ray McMillan; (5) May permission affecting the policy or waiver of its provisions be effected by the insurance agents, by oral agreement or understanding, despite the customary provision contained in these policies requiring a writing.

We are here led into a labyrinth of intra-office and inter-office insurance dealings. As has been stated, appellant orally requested $40,000 fire insurance, and had no more to do with the obtaining of coverage except that he and his office communicated to the insurance office staff of Truman Stivers and the latter himself, that a man would be living on the property in order to effectuate the insurance. In turn, this information was passed on to Ray McMillan, agent for Queen and Pennsylvania. (In fairness it should be stated there is a conflict in the evidence on this.)

A. Truman Stivers Was Agent for Appellees Girard and National American.

The trial court found that Truman B. Stivers was licensed by the State of California as an insurance agent and was an agent of defendants National American and

Girard in Pasadena, California. [Tr. p. 86.] The trial court further found, however, that in the handling of the insurance involved, Truman B. Stivers acted as agent of appellant, impliedly finding that he was not the agent of appellees, National American and Girard, in placing the insurance. [Tr. pp. 86-89.]

These findings were apparently based upon the testimony of appellant on cross-examination that Truman Stivers wrote practically all of his insurance:

> "Q. And he acted as an agent for you, did he, in taking care of your insurance? A. Yes." [Tr. p. 122.]

Appellees cannot avert responsibility for the statements or acts of their formally appointed agent in the insurance business, by asking a layman if the agent was his insurance agent. The court could undoubtedly take judicial notice of the fact that the layman customarily regards the person to whom he entrusts his insurance business as "my agent," or "my insurance agent." Nevertheless, it is not necessary to rely upon judicial notice, for the evidence clearly shows Truman Stivers was agent for Girard and National American.

Truman Stivers has been a licensed insurance agent since 1948. [Tr. p. 172.] He represents various companies and represented appellee Girard in 1949 and in 1952 at the time the policies sued upon were issued and represented National American at that time also. [Tr. pp. 172-173.] He had a letter of authorization dated 1951, from appellee, National American, granting him "full powers to act for" the company [Pltf. Ex. 5] which was his appointment as agent for that company. [Tr. p. 174.] Likewise, from September of 1948 he had had

an agency agreement to act as agent for Girard as principal, with "full power and authority to receive and accept proposals for insurance." [Pltf. Ex. 6.]

Truman Stivers testified that at the time of issuing the policies in 1952 he was operating under these written instructions. As agent he countersigned policies, executed endorsements, and kept a supply of endorsements at his office, and had authority to prepare policies, although for convenience the policies were prepared by the companys' office force. [Tr. pp. 175-176.] He had written other insurance for appellant and on many occasions had advised appellant that he was insured from the moment appellant requested him to issue insurance. [Tr. p. 176.] In this instance, the policies and endorsements were prepared at the offices of Girard and National American and transmitted to Truman Stivers' office to be countersigned by him. [Tr. pp. 136-137.] There was no testimony to the contrary respecting Truman Stivers' agency with Girard and National American or the scope of his authority.

Under these circumstances, and in view of the fact that the usual business routine of Truman Stivers' office was followed as with all his insurance clients, Truman Stivers was the agent of Girard and National American, and not of the insured, with authority to enter into an agreement or to make representations which would be binding on his principals. An insurance agent is defined in the Insurance Code of California, Section 31, as "a person authorized by and on behalf of an insurer, to transact insurance." Truman Stivers was so authorized by Girard and National American.

B. The Procedure Followed in Placing the Insurance.

In October, 1954, appellant had talked with Truman Stivers and requested $40,000 coverage. [Tr. p. 113.] About the same time, that is about 60 days before the expiration date of the policies in effect, and in accordance with office practice, the general office manager of Truman Stivers' insurance office in Pasadena, contacted the insured's office for renewals. Truman Stivers' office manager, Mrs. Dynes, talked with Mrs. Zimmerman of appellant's office, and the latter advised they would like $40,000 insurance. [Tr. p. 132.] Mrs. Dynes testified she advised Mrs. Zimmerman that to keep the insurance effective someone had to be living on the premises and Mrs. Zimmerman said they would have someone living on the property at all times. [Tr. p. 134.]

The office manager for appellant, Mrs. Zimmerman, confirmed this conversation with Truman Stivers' office manager and testified Mrs. Dynes told her "with regard to placing the policies on the packing house, that in case of fire, since the plant was non-operating, that it would be necessary for us to put someone on the property, to live on the property. . . ." [Tr. p. 147.] After discussing her memorandum of the conversation with appellant, Mrs. Zimmerman called Mrs. Dynes back and advised her that appellant wanted to place the insurance in the amount of $40,000, "and that the people would be put on the place, on the property." [Tr. p. 148.] Appellant's office manager was informed by the insurance agent's manager that the rates would be higher because the plant was not in operation. [Tr. pp. 148, 151.] Mrs. Zimmerman couldn't remember whether the word "watchman" was used in these conversations but she wrote that word down in her memorandum book. [Tr. p. 150.] As she

understood "the requirements were that there would be someone living on the property. . . ." [Tr. p. 151.] Mrs. Dynes was not familiar with the "watchman's" endorsement at the time the policies were written [Tr. p. 137] and of course that provision or requirement was not included in the policies.

After these conversations with appellant's office manager, Mrs. Dynes turned the matter over to Mrs. Heysler, the insurance agent's office secretary, to get the policies issued. [Tr. p. 134.]

The National American and Girard policies were written at the companies' offices and forwarded to Truman Stivers' office so that he could countersign the policies and the endorsements and deliver them to the appellant. [Tr. p. 137.] Mrs. Heysler signed Truman Stivers name to the policies and they were then sent to appellant together with the premium bill which was thereafter paid. [Tr. p. 138.] Mrs. Dynes and Mrs. Heysler were authorized to act for Truman Stivers and had authority to countersign the policies and mail them to the insured. [Tr. pp. 182-183.] Truman Stivers doesn't recall personally seeing the policies. [Tr. p. 183.]

Mrs. Heysler, Truman Stivers' office secretary, who actually handled the placing of the insurance with the four appellees was instructed by Mrs. Dynes and Truman Stivers to call various companies to see if they would carry it and at what rates. [Tr. p. 154.] The reason why all the insurance was not on one policy was that:

> "On a large amount of insurance, even on large commercial buildings, insurance companies do not like to accept the full responsibility. They like to place it in various companies so that one company does not suffer the whole loss." [Tr. pp. 138-139.]

Mrs. Heysler first called National American to obtain rates. She talked to the rate clerk, described the plant and how much coverage was wanted. [Tr. p. 155.] She then called Girard, and like National American, they would only take $10,000 of the coverage and it was necessary to find a company that would take the rest of it. [Tr. p. 156.] For that purpose she called Roy McMillan, another insurance agent. [Tr. p. 156.]

Mrs. Heysler told McMillan in the phone conversation that the policies were expiring and asked if they would renew. McMillan asked various questions and asked if the plant were operating. Mrs. Heysler stated she didn't know, but Neil Stivers happened to be in the back office so she asked McMillan to wait while she inquired of Neil Stivers. [Tr. p. 157.] Neil Stivers told her the plant was not operating and followed Mrs. Heysler to the front office where she was talking to McMillan on the phone.

Mrs. Heysler told McMillan that the plant wasn't operating at this time but that Neil Stivers had told her that they were putting a man in living quarters behind the plant "so they could more or less keep his eye on it at all times." [Tr. p. 158.] McMillan said he would look into it and find out if the companies would renew and for how much. [Tr. p. 158.] Later McMillan called back and said he could get $20,000 "so we told him to place it." Subsequently, the Queen and Pennsylvania policies were sent from McMillan's office to Truman Stivers' office. The policies and bills were mailed to appellant. [Tr. pp. 161-162.]

The notes made by Mrs. Heysler at the time of her phone conversation with McMillan showed that she wrote at that time ("going to put a man in"). [Deft. Ex.

"A," incorrectly reported in transcript as "going to put Ahmanson in"; Tr. p. 168.]

McMillan recalled that a lady in the office of Truman Stivers had called him concerning the policies and testified "It would be pretty hard to do [state the conversation] at this time." [Tr. p. 242.] Appellee's counsel asked McMillan whether the lady from Truman Stivers' office made any statement concerning the property being unoccupied" and McMillan stated: "I do not recall there was any statement made at the time. And we did not order it that way. So in all probability there was none." [Tr. p. 243.] In view of McMillan's hazy recollection of the conversation, even as to who had called him, and Mrs. Heysler's clear recollection thereof, corroborated by notations in her memoranda which defendants offered in evidence [Deft. Ex. "A"] we believe the only clear inference is that the information about having some one living on the property in lieu of operating was communicated to McMillan.

McMillan has been in the insurance business 28 years. He sometimes prepares policy endorsements and sometimes the company does. He has authority to do so, and also authority to countersign conclusive contracts of insurance. [Tr. p. 249.] He was an agent for appellees, Queen and Pennsylvania, and obtained original coverage on the property involved in 1949 with various companies. [Tr. pp. 241-242.]

Appellees called various witnesses from the companies to testify that the insurance was accepted and the rates fixed on the basis that the premises were "occupied" [Tr. pp. 207-219, 228-256] or to testify as to lack of knowledge on the part of the witness that the plant was not operating, [Tr. pp. 252-255.]

There was an indication that sometime between November 28, 1952, and May 23, 1953, an actual inspection of the premises was made by the Pacific Fire Rating Bureau from which all of the appellee companies obtain their rates. On the former date Donald, chief underwriter of H. A. Ahmanson & Company, the general agents for National American, had written Pacific Fire Rating Bureau in San Francisco, asking them to inspect the premises and they did so, subsequently publishing rates on May 22, 1953. [Tr. pp. 237-238.] It is the customary practice of the Pacific Fire Rating Bureau to send a form letter stating what they found which was not in accordance with the company's application. In this instance no such letter was sent reporting any difference in the property as inspected from the property as reported in the application. [Tr. p. 239.]

C. The Companies Were Bound by the Knowledge and Agreements of Their Agents.

Certain principles applicable to the facts above related may be derived from the authorities:

> (1) A local agent (such as Truman Stivers and Roy McMillan) who has full power to consummate contracts by countersigning and delivering the same, has authority to bind his principal to an oral agreement or waiver made by him, irrespective of a provision of the policy that any waiver or permission must be in writing.

The leading California decision frequently cited on the authority of a local agent for an insurance company is *Farnum v. Phoenix Ins. Co.,* 83 Cal. 247. In holding that the insured was covered by insurance despite the fact that the premium therefor was not actually paid before the

loss and the agreement by the agent to extend credit was not endorsed upon the policy, the California Supreme Court said at page 254:

> "In this case the local agent of defendant at Stockton had unquestionable power to extend a credit upon the premium for the period of at least 60 days. He represented the full power of the company to make a consummated and binding contract of insurance by counter-signing and delivering the policy; and when he countersigned and delivered it unconditionally as a completed contract, under a specific agreement for payment of the premium at a future date, he thereby waived, to the full extent to which the company itself could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy. 'An insurance agent clothed with authority to make contracts of insurance or to issue policies stands in the stead of the company to the assured.' (*Ricard v. Queen's Ins. Co.,* 62 Miss. 728.)"

At page 256, the court said:

> "Whether an agent has general or only particular powers is not determined by simply calling him a local agent (*Murphy v. Southern L. Ins. Co.,* 3 Baxt. 448; 27 Am. Rep. 761). An agent who under general instruction from the home office has authority within a certain territory to deliver policies and receive premiums is a general agent, and has authority to waive cash payment. (*Southern Life Ins. Co. v. Booker,* 9 Heisk. 606; 24 Am. Dec. 344.) A local insurance agent is presumed to have power co-extensive with the business entrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals. (*Baubie v. Aetna Ins. Co.,* 2 Dill. 156.) Where by the

terms of a policy a particular local agent is to countersign it to make it valid, so that the insured must deal with him, and no one else, he represents the power of the company, so that any policy which he countersigns binds the company to any person insured through his agency who has no notice of limitation of his power, though he may have exceeded his authority and violated his duty to his principal. (Citing cases.)

"A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority. (Citing cases.)"

As to agreements made at the inception of the policy and knowledge at the time of inception on the part of the company's agent, the Court said at page 260:

"And it has been repeatedly held that where any fact which would constitute a breach of a condition precedent to any liability of the company on the policy is fully known to an agent of the company, local or general, who was authorized to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy as a valid and completed contract is an exercise of the power of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers of conditions expressed in the policy shall be in writing endorsed on the policy. (Citing cases.) It is also well settled that an insurance company cannot so limit its capacity to contract by general stipulation as against waiver of conditions, or that its contracts

or waivers must be in writing, that it cannot by its agents make an oral contract or an oral waiver not forbidden by the statute of frauds. (Citing cases.)

"Whether or not any particular agent has the general power of the company to make an oral contract or an oral waiver of a condition, notwithstanding the provision in the policy requiring a writing, is a question of fact. (Citing cases.)

"The authorities before cited show that a local agent who is clothed with general power to solicit and consummate contracts of insurance within a certain territory stands in the stead of the company, and represents its whole power to give validity to the contract which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition *as to the mode of waiver* of such conditions precedent. In this case, the circumstance that the company had general agents for the state located at San Francisco does not affect the question, since it conferred its whole power in regard to the policy in question upon its agent at Stockton, who appears to have received his appointment and instructions directly from the home office, in the State of New York, and who signed himself as the direct agent of the defendant. Of the authorities hereinbefore cited, the following directly affirm the ostensible power of such a local agent to bind the company by waiver of any condition precedent to its liability, and to dispense with the requirement that such waiver shall be in writing endorsed upon the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of delivery of the policy was not indorsed upon it. (Citing cases.)"

In numerous decisions following the *Farnham* case, the same principles have been affirmed. In *Bank of Anderson v. Home Ins. Co.,* 14 Cal. App. 208, the local agent was held to have power to bind the company by oral contract or waiver despite an express provision in the insurance contract against such waiver unless endorsed on the policy in writing. The agent had been told that the insured had obtained an additional policy but the agent neglected to note that fact on the policy as required by its terms. The Court said at page 214:

> "It is admitted that no agreement permitting the subsequent insurance nor any waiver of said provision was indorsed on said policy, and that circumstance presents the second question raised by appellant. Notwithstanding, however, the unequivocal and exacting terms of said provision, it is settled by the decisions beyond controversy that the insurer may be bound by the waiver of a general agent, although no indorsement whatever is made upon the policy."

The court cited and quoted from *Arnold v. American Ins. Co.,* 148 Cal. 660; *Mackintosh v. Agricultural Fire Ins. Co.,* 150 Cal. 440; and *Raulet v. Northwestern Etc. Ins. Co.,* 157 Cal. 213, and stated:

> "The evidence shows that the agent, Mr. Barkuloo, was clothed with authority to waive said condition and stipulation and that his conduct and declarations must be regarded as a waiver of the same. He testified that 'As agent for the Home Insurance Company I issued policies, cancelled policies, indorsed policies, issued and delivered policies, solicited and wrote insurance, collected the premiums for the company, remitted them to the company, and attended to the business of the company generally.' There is no evidence to the contrary. If the foregoing powers

did not constitute him a general agent in that community it is difficult to conceive what additional authority is required for said purpose. 'Agents authorized to issue and deliver policies are regarded as having the same power to waive conditions in policies as the company themselves, and can therefore waive conditions and forfeitures.' "

To the same effect was *Kazanteno v. Cal-Western etc. Ins. Co.,* 137 Cal. App. 2d 361, where the insured under an accident policy relied upon an oral conversation with the insurance agent wherein the latter said "everything was all right," even though an application for increased insurance had not been received by the company from the agent until after insured was injured. The court relied on the established principle that oral agreements for insurance are valid in California as are oral agreements respecting all phases of insurance contracts, and that the local agent had ostensible or actual authority to make an oral agreement as a representative of the Company.

And in *Chase v. National Indemnity Co.,* 129 Cal. App. 2d 853, the local agent at Oxnard was held to be a general agent for the insuring company with authority to waive conditions in an insurance policy by mere parol, even though the policy required waivers to be in writing.

See *Eagle Indemnity Co. v. Industrial Acc. Com.,* 92 Cal. App. 2d 222. (Knowledge of agent that deceased pilot killed in airplane crash was to be included in persons covered by compensation policy, held to bind company and permit reformation of policy to include pilot.)

And in *Arnold v. American Ins. Co.,* 148 Cal. 660, the knowledge of an insurance adjuster for defendant

company that gasoline was kept on the insured premises was held to defeat the insurer's contention that the policy was voided because of a provision that the policy was void if petroleum were kept on the premises. The printed stipulation against waiver except by writing was considered "not . . . at all material" and did not prevent the conduct of the officers of the company from constituting a waiver or estoppel on the company.

See:

14 *Cal. Jur.,* Sec. 84, p. 526;

17 Appleman, Insurance Law and Practice, Sec. 9603, p. 303, Sec. 9604.

(2) The contemporaneous and practical construction of a term of the policy by the insurance agent and the insured are strong evidence of its meaning and the agent's construction is binding upon the company.

In *Raulet v. Northwestern Ins. Co.,* 157 Cal. 213, 223, 224, a question was raised as to whether credit for the unpaid premium had been extended by the insurance agent. The court said at page 223:

> "But, as pointed out by respondent, the phrase 'in consideration of twenty-four dollars premium' involves a latent ambiguity. It is manifest that it may be construed as indicating payment or the promise of payment of the premium as the consideration. Hence it was proper for the court to consider the conduct of the parties as indicative of their understanding of this provision. 'The contemporaneous and practical construction of a contract by the parties is strong evidence as to its meaning if its terms are equivocal.' (*Keith v. Electrical Eng. Co.,* 136 Cal. 181.) If plaintiff had understood payment to be the consideration and had intended to rely upon it

there would have been no such unconditional delivery of the policy without prepayment. From this latter circumstance the court was justified in concluding that the defendant extended credit, as within common konwledge is usually done in favor of responsible parties. To the aid of the court's finding may be summoned, also, the rule of construction generally recognized and well established that 'every indulgence not inconsistent with the plain meaning of the contract must be shown the assurer.' "

At page 233, the court said:

"As to the point made by appellant that the waiver could only be in writing as provided by the terms of the policy, the case of *Farnum v. Phoenix Ins. Co.,* 83 Cal. 246 . . . seems decisive. A large number of cases is therein cited and the conclusion is reached that 'An insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions or that its contracts or waivers must be in writing, that it cannot by its agents make an oral contract or a waiver not forbidden by the statute of frauds. Whether or not any particular agent has the general power of the company to make an oral contract or oral waiver of a condition notwithstanding the provision in the policy requiring a writing, is a question of fact.' "

In *Chase v. National Indemnity, supra,* 129 Cal. App. 2d 853, the agent's construction of the territorial limitation provisions of the policy was held binding upon the company.

(3) Where an insurance agent undertakes to advise the insured he has a duty to give the correct advice. And specifically, if the agent gives advice as to what

is necessary to constitute "occupancy," the company has been deemed either to have waived the occupancy provision or to be estopped to assert that the agent's advice was incorrect.

In *Glickman v. New York Life Ins. Co.,* 16 Cal. 2d 626, the insured informed the agent that he was disabled and could not pay his premiums and the agent informed him that the only thing he could do was to surrender the policy and get its cash value, whereas in fact by the terms of the policy he was entitled to certain disability benefits. The California Supreme Court stated at page 634:

> "It therefore would be manifestly unjust, in this equitable action, to rule that the representations of the insurer's agent,—by which the insured was misinformed and misled with regard to his rights,—should operate to the prejudice of the insured and where, as here, a policyholder has approached his insurer with a request for advice concerning his rights under the policy,—if the agent of the insurer *undertakes to advise him,*—at least it should be the duty of such representative to make no false or misleading statement in that respect. Particularly should that be a requirement on the part of the insurer, or its agents, where, as in the present case, the information sought and given might have a direct and material bearing on the continuance of the life of the policy. In the instant case, the false and misleading statements of the insurer's representative as to the asserted rights of the insured under the policy not only operated to deprive the insured of one of the principal benefits accorded him by his contract, but they also resulted in a substantial gain to the insurer. In legal effect, such representations amounted to constructive fraud. (§1573, Civ. Code;

Hargrove v. Henderson, 108 Cal. App. 667, 673; 12 Cal. Jur., p. 710, and cases there cited.)

"Contract of insurance should be viewed in the light of their general objects and purposes, including the legitimate conditions prescribed by the insurer (*Raulet v. Northwestern etc. Ins. Co.,* 157 Cal. 213.) . . . In general, the object and purpose of insurance is to indemnify the insured in case of loss, and ordinarily such indemnity should be effectuated rather than defeated. To that end the law makes every rational intendment in order to give full protection to the interests of the insured. (1 Couch Cyc. of Ins. Law, p. 402 *et seq.*)"

A case most appropriate to the facts here presented is *West Coast Lumber Co. v. State Inv. and Ins. Co.,* 98 Cal. 502. This was an action for fire loss on a three story frame store building located in San Diego. Plaintiff lumber company had a lien for lumber furnished on the building and had insured that interest. Prior to the loss defendants' agent was informed by the plaintiff that the leasehold interest had been surrendered by the tenant and was assured by the agent of defendant that no change in the policy of insurance was necessary by reasons thereof. The opinion states, beginning at page 508:

"The question involved under this head is not as to the binding effect of the clauses in the policy as to change of ownership or possession or as to the original right of defendants to insist upon their observance, and in default thereof to uphold a forfeiture of the policy. The proposition is rather that conceding all this, could and did the defendant waive their observance? Insurers may and often do by their acts and conduct place themselves in such a position that they cannot avail themselves of a

defense which they might otherwise interpose to an action upon their policies. When thus placed they are said to be estopped from availing themselves, or to have waived their right to avail themselves of such a defense.

"If, as was the case here, a building is insured against loss by fire under a policy containing a proviso that it shall be or become void in case the building is or shall become vacant or unoccupied, when, as was well known to the insurer at the date of the policy and subsequently, it was and remained unoccupied, the insurer will be presumed to have waived the clause as to occupancy. *May on Insurance* states it in this wise: 'To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as ground for avoidance, is to attempt a fraud. This the courts will neither aid nor presume; and when the alternattive is to find this or to find that, in accordance with honesty, there was an intent to waive the known ground of avoidance, they will choose the latter.' (*May on Ins.,* Sec. 497; *Commercial Ins. Co. v. Iwes,* 56 Ill. 402.)

". . .

"The agents of the defendant at San Diego having the authority to do so act must be presumed by their conduct and declarations exercised and made with full knowledge of all the facts, to have waived on behalf of defendant its right to have the policy terminated by the surrender of the leasehold interest of Newkirk to his lessor. To hold otherwise would be to uphold practices which would lull the insured into fancied security, to prevent their seeking other and further insurance, until when too late they find themselves doomed to loss by confiding in the decla-

rations and following the advice of those who are bound by every consideration of justice and honesty to speak the truth, or at least to stand mute.

"Defendant had a right to cancel his policy or to treat it as forfeited by reason of the change of title and possession; it failed to do so when it should, if at all, and cannot now be permitted to profit at the expense of plaintiff, who would be a sufferer by the delay."

A case closely analogous factually to this matter is *Hotchkiss v. Phoenix Ins. Co. of Brooklyn,* 76 Wis. 269, 44 N. W. 1106.

Defendant company issued a fire policy in 1888 on a dwelling house occupied by a tenant of the insured. The tenant moved out of the house and it became unoccupied, except that the insured personal property remained therein and the plaintiff visited the house two or three times a week until the fire, less than a month later. The company refused to pay the loss claiming it was relieved from liability by a condition in the policy to the effect that if the premises should become vacant or unoccupied the policy should be of no force or effect during the time the premises should continue vacant or unoccupied. The court said at page 1107:

"The testimony tends to show that, immediately after the tenant vacated the insured house, the plaintiff went to see the agent of the defendant company at Omro, where the insured property was situated, informed him that the tenant had so removed, and asked him if her insurance was good, or, if it needed any change, what she should do, and that the agent replied that her insurance was good just as it was, and agreed to carry it in that way for thirty days.

Also, the question having been suggested to the agent whether the house would be considered occupied while the plaintiff's goods remained in it, he said it would, and there was no need of any vacancy permit to save the insurance while it was occupied in that way. This conversation occurred with the agent who issued the policy, and less than thirty days before the insured property was burned.

". . .

"There is no claim here that the agent waived any condition of the policy, but only that he construed certain words contained in it in a certain way. The term 'vacant or unoccupied' has no definite signification, applicable alike to all cases. If it had, the plaintiff would be bound by such signification. Under certain circumstances, premises may be vacant or unoccupied, when under other circumstances premises in like situation may not be so, within the meaning of that term in insurance policies. Thus, if one insures his dwelling-house, described in the policy as occupied by himself as his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insure it as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant, and the policy forfeited or suspended, according to its terms, immediately upon the tenant's leaving it. This distinction is made in some of the cases,—in Lockwood v. Assurance Co.,

47 Conn. 553, 561; Whitney v. Insurance Co., 9 Hun. 39; 1 Wood, Ins., §91, pp. 208-210, and cases cited.

"In this case the insured house was 'to be occupied by the assured or tenant as a dwelling.' It was in fact occupied by a tenant when the policy was issued, of which the company had notice. It being doubtful what the term 'vacant or unoccupied' means in such a case, and the policy in suit failing to define it, the plaintiff had the right to know whether the insurance company regarded her house as vacant or unoccupied immediately upon her tenant's leaving it, to the end that, if the company did so regard it, she might taken the necessary steps to keep good the insurance. This being a foreign insurance company, and presumably having no general officer in this state, there was no one but the agent of the company at Omro to whom she could conveniently and directly apply for the desired information. She promptly applied to him, and he assured her, as the jury must have found, that, notwithstanding the removal of the tenant, her policy, just as it was, would remain valid for thirty days. That is to say, he assured her, in substance and legal effect, that the removal of the tenant did not render the premises 'vacant or unoccupied,' within the meaning of that term in the policy as understood by the company. We think she applied to the right person for the desired information, and that the company is bound by the construction which, in its behalf, the agent put upon the policy.

"The policy contained a stipulation that the agent of the company had no authority to change any of its conditions or restrictions by parol. But it is obvious that this stipulation is not involved in the

determination of this case, for the agent did not assume to change any such condition or restriction."

This case thus declares that the construction of the word "occupied" placed on the policy by the agent is not a change in any of the conditions of the policy, but is the construction of an uncertain word.

However, in *North River Ins. Co. v. Rawls,* 214 S. W. 925, 185 Ky. 509 (1919), similar statements by the agent were held to effect a waiver of the occupancy provision of the policy, where the policy contained the usual provision that the policy was to be void if the building became vacant or unoccupied and so remained for ten days. The company relied on the provision, but plaintiff replied that the building had not become vacant or unoccupied; that he had a tenant on the property, all the time, except for a very brief period, and at that time he left in his residence furniture enough to furnish a room, and that before he left his house without a tenant for the short period mentioned he had applied to the agent for the insurance company for a vacancy permit, and that the agent for the company instructed him not to insist upon a vacancy rider, but to leave part of his furniture in the house, and if he would do so his house would not be vacant or unoccupied within the meaning of the clause of the contract above quoted; that in compliance with said instruction he did leave in said house certain furniture sufficient to furnish one room; that the said agent was the same who had solicited and procured his insurance, collected the premium, and delivered the policy to Reeder, and that by his said instruction he had for the insurance company waived the vacant or unoccupied clause of the policy, and said clause was not in force or effect at the time the fire occurred, but the policy was in full force and effect at said time.

This recurrent problem and an identical result in a case also similar to this matter is related in *Gordon v. St. Paul Fire & Marine Ins. Co.,* 197 Mich. 226, 163 N. W. 956 (1917). In that case at the time of the writing of the policy the plaintiff asked the agent whether she would get anything if anything happened while the house was vacant and was told by him that it would not be vacant within the policy if she had some furniture in it and visited it every 10 days or 2 weeks. From time to time thereafter the property was occupied by tenants, and the last tenant moved out some five or six months prior to the loss. The policy provided that the agreement would be void if the building became vacant or unoccupied and so remained for 10 days. The court held that it was permissible for a plaintiff to show that defendant's agent had knowledge when the policy was written that the premises were vacant, but that the conversation was inadmissible to show the agent's construction of the word "vacant" as used in the policy. The court said this was a matter of law and the agent's opinion could not bind the defendants or the courts, but held the company estopped from asserting a forfeiture for a condition of the premises existing at the time of the fire, which existed to the knowledge of the company at the making of the contract and which condition of the premises it was not agreed by the contract of insurance was to be changed. One case cited is *Cross v. National Fire Ins. Co.,* 132 N. Y. 133, 30 N. E. 390, where the court stated that plaintiff could recover despite the unoccupancy provision because "plaintiff's son was the general agent of the defendant, and personally examined the buildings before issuing the policy, and knew that they were vacant and unoccupied."

Thus in cases of closely parallel factual situations, the courts have held that the rights of an insured who in good faith makes known the facts to the agent and receives advice from him as to how the insurance is to be kept in effect, and who follows that advice, may not be forfeited by the insurer.

Conclusion.

We respectfully urge that the judgment be reversed on either of two alternative and distinct grounds: (1) that the insured property was in fact "occupied" at the time of the fire, or (2) that by reason of the conduct or knowledge of their agents, appellees are estopped to assert that the premises were unoccupied or have waived their rights to do so, and as a corollary to the latter proposition, constituting perhaps still a third ground, that appellees are bound by the construction placed upon the policy as approved by their agents.

Respectfully submitted,

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